

84-715 (2)

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE  
UNITED STATES

Office Supreme Court, U.S.  
**FILED**  
NOV 3 1984  
ALEXANDER L. STEVAS,  
CLERK

OCTOBER TERM, 1984

STATE OF ALABAMA AND  
CHARLES A. GRADDICK,  
ATTORNEY GENERAL, PETITIONERS

VS.

DARRYL PRUITT, RESPONDENT

APPENDICIES TO THE PETITION  
FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

OF

CHARLES A. GRADDICK  
ATTORNEY GENERAL

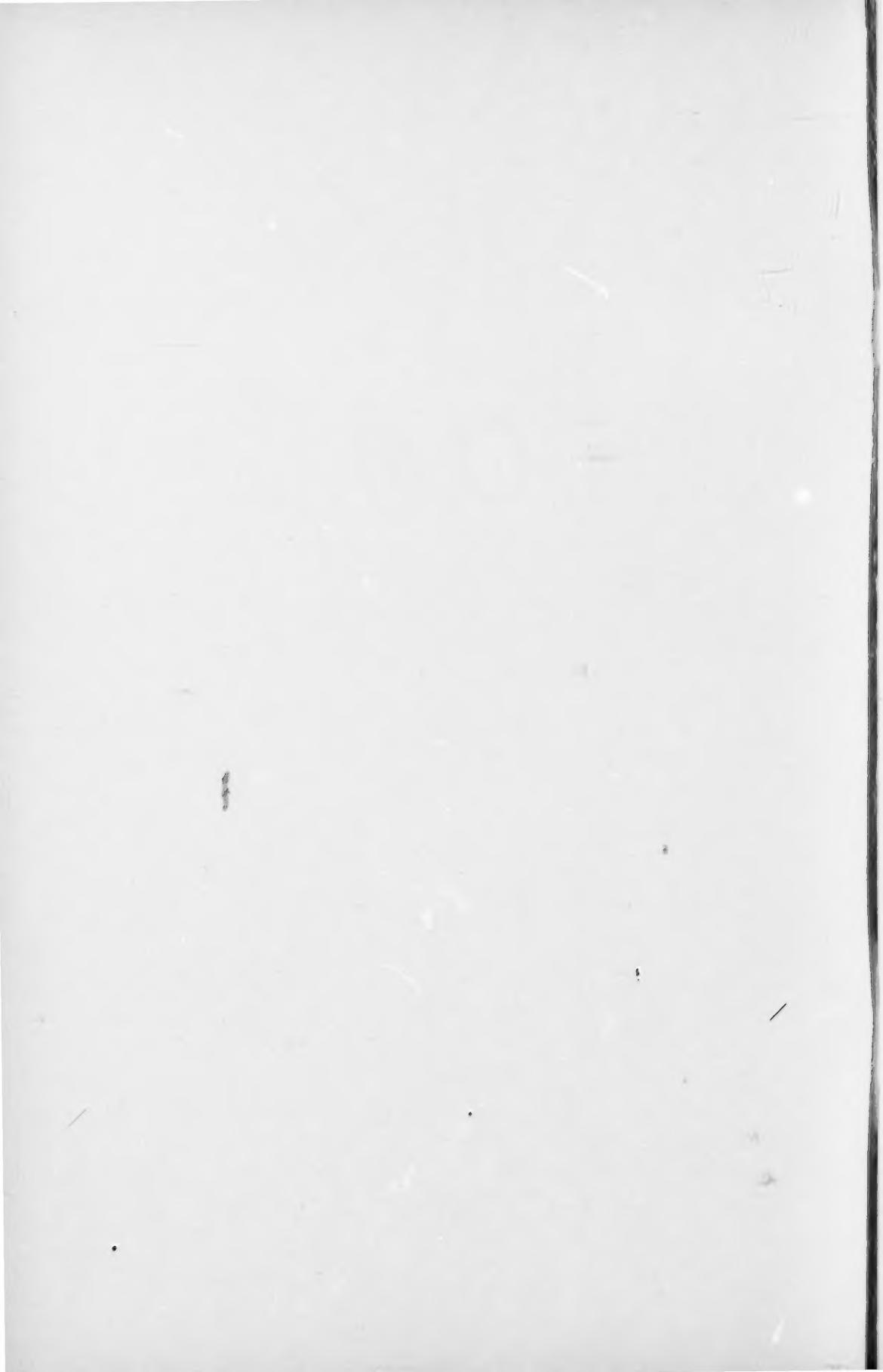
AND

JOSEPH G. L. MARSTON III  
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
250 Administrative Building  
64 North Union Street  
Montgomery, Alabama 36130  
(205) 834-5150

ATTORNEYS FOR PETITIONER

40 RP



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## APPENDIX A

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE MIDDLE DISTRICT OF  
ALABAMA, NORTHERN DIVISION

DARRYL PRUITT, )  
                    )  
Plaintiff,        )  
                    )  
v.                 )CIVIL ACTION NO.  
                    )  
THE CITY OF       )  
MONTGOMERY; et al., )  
                    )  
Defendants        )

### ORDER

Plaintiff Darryl Pruitt has brought this cause of action under 42 U.S.C.A. § 1983 and Alabama constitutional and tort law against defendants City of Montgomery, Alabama and Lester Kidd, formerly a city police officer. Pruitt seeks to recover for injuries he suffered when he was shot by Kidd.

This cause is now before the court on Pruitt's May 17, 1984, motion for summary judgment and the defendants' May 29, 1984, motion for summary judgment.

For reasons which follow, Pruitt's motion is due to be granted in part and denied in part, and the defendants' motion is due to be denied.

I.

On the night of September 2, 1982, Officer Kidd and another officer responded to radio reports of a suspected burglary in progress in a building on West Fairview Avenue in Montgomery. The suspects were described as black males. As Kidd walked near the rear of the building he encountered Pruitt, who is black, emerging from a bush. Pruitt immediately began to flee on foot. Kidd ran a few steps after Pruitt before deciding that he would be unable to overtake Pruitt. Kidd then shouted directions to Pruitt to "halt, police." When Pruitt failed to stop Kidd fired two shots at Pruitt from a twelve-gauge

shotgun. At least one of the shots struck Pruitt in the area of the buttocks, bringing him to the ground. Pruitt was searched at the scene and found to be unarmed.

Pruitt was subsequently arrested and charged with commission of a rape that had allegedly occurred in the building. A Montgomery County grand jury failed, however, to return an indictment on this charge. Also, there was no burglary as suspected.

The regulations of the Montgomery City Police Department authorize the use of deadly force if necessary to stop a fleeing felony suspect. These regulations are based upon an Alabama statute permitting law enforcement officers to use deadly force "[t]o make an arrest for a felony or to prevent the escape from custody of a person arrested

for a felony, unless the officer knows the arrest is unauthorized." 1975 Ala. Code §13A-3-27 (Supp. 1982).

Kidd testified by deposition that, relying on the State and City's deadly force policy, he shot Pruitt to prevent him from escaping arrest. Kidd stated that when he fired his weapon he considered Pruitt a prime burglary suspect, but he did not believe Pruitt posed a danger of death or bodily injury to anyone. Kidd stated that he would not have fired had he believed that other officers responding to the call would have intercepted Pruitt and effected an arrest.

## II.

The parties have moved for a summary judgment on the issue of the liability of the City and Kidd for violation of

Pruitt's civil rights under § 1983 and Alabama constitutional and tort law.

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Furthermore, even when the underlying facts are undisputed, summary judgment should not be granted unless reasonable minds could not differ on the inferences to be drawn from those facts. See Warrior Tombigbee Transportation Co. v. M/ Nan Fung, 695 F.2d 1294, 1296-97 (11th Cir. 1983). This is an appropriate case for summary judgment.

In Ayler v. Hopper, 532 F. Supp. 198 (M.D.Ala. 1981), the court held that use of deadly force<sup>[1]</sup> to stop a fleeing or

---

1. Alabama law defines deadly force as "[f]orce which, under the circumstances in which it is used, is readily capable

escaping felon constituted a civil rights violation actionable under § 1983 "unless the official has good reason to believe that the use of such force is necessary

---

Footnote 1 continued:

of causing death or serious physical injury." 1975 Ala. Code § 13A-3-20(2) Supp. 1982). The Model Penal Code definition of deadly force is

force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

Model Penal Code § 3.11(2)(1962). See Mattis v. Schnarr, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976), vacated as moot sub nom., Ashcroft v. Mattis, 431 U.S. 171, 97 S.Ct. 1739 (1977). Under these definitions of deadly force, the defendants' contention that Kidd was not using deadly force because he intended to and did only wound Pruitt is untenable.

to prevent imminent, or at least a substantial likelihood of, death or great bodily harm." *Id.* at 201. See also *Garner v. Memphis Police Department*, 710 F.2d 240, 246 (6th Cir. 1983), cert. granted, \_\_\_\_ U.S. \_\_\_, 104 S.Ct. 1589 (1984); *Mattis v. Schnarr*, 547 F.2d 1007, 1020, (8th Cir. 1976), vacated as moot sub nom., *Ashcroft v. Mattis*, 431 U.S. 171, 97 S.Ct. 1739 (1977). Ayler held § 13A-3-27 of the 1975 Code of Alabama unconstitutional to the extent that it permitted use of deadly force in other circumstances. 532 F. Supp. at 201.

Officer Kidd's testimony about the shooting is clear and straightforward and permits only one reasonable conclusion: Kidd shot Pruitt to prevent him from escaping arrest, and not because he posed a danger of death or bodily injury to anyone. Kidd's use of deadly force under

these circumstances did not meet the Ayler standard and, therefore, violated Pruitt's civil rights.<sup>2</sup>.

Municipalities are subject to § 1983 liability when a cognizable injury is inflicted by "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy...." Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38 (1978). See

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2. In Garner v. Memphis Police Department, 710 F.2d 240,, 246 (6th Cir. 1983), cert. granted, \_\_\_\_ U.S. \_\_\_, 104 S.Ct. 1589 (1984), the Sixth Circuit stated that "officers may be justified in using deadly force if the suspect has committed a violent crime or if they have probable cause to believe that he is armed or that he will endanger the physical safety of others if not captured." Id. at 246. Kidd's use of deadly force fails to meet the constitutional standard announced in Garner.

also e.g., William v. City of Valdosta,  
689 F.2d 964, 969 (11th Cir. 1982).  
Here, the policy of the Montgomery City  
Police Department authorized the  
unconstitutional use of deadly force, and  
Pruitt's shooting was merely an execution  
of this policy. Taylor v. Collins, 574  
F. Supp. 1554, 1559 (E.D. Mich. 1983).

The City of Montgomery is, therefore,  
liable to Pruitt under § 1983 for the  
unconstitutional use of deadly force upon  
him.<sup>3</sup>

Kidd, on the other hand, maintains  
that, even if his use of deadly force was  
unconstitutional, he is "qualified  
immune" from any liability. Harlow v.

---

3. The only issue left for trial on  
Pruitt's § 1983 claim against the City is  
the amount of damages.

Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727

(1982).<sup>4</sup> The court declines to reach this issue at this time. Pruitt has informed the court that he may dismiss his claims against Kidd in the event the city is found liable on the § 1983 claim.

Pruitt has also asserted causes of action under Alabama constitutional and tort law under the pendent claims doctrine of United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966). In light of the court's disposition of the § 1983 claim against the City, the court does not see a need to address the state law claims at this time.

Accordingly, for the reasons stated above, it is ORDERED:

---

4. The good faith or qualified immunity, if any, of a municipal agent executing city policy does not alter the municipality's liability. Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398 (1980).

(1) That the plaintiff's May 17, 1984, motion for summary judgment be and it is hereby granted in his favor and against defendant City of Montgomery Alabama on the issue of liability under 42 U.S.C.A. § 1983; and that said motion be and it is hereby denied in all other respects; and

(2) That the defendants' May 29, 1984, motion for summary judgment be and it is hereby denied.

If is further ORDERED that this cause be and it is hereby set for a second pretrial conference on June 13, 1984, at 4:00 p.m. at the federal courthouse in Montgomery, Alabama. The clerk of the court is DIRECTED to notify the parties by telephone.

DONE, this the 12th day of June, 1984.

/s/ Myron Thompson  
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE MIDDLE DISTRICT OF  
ALABAMA, NORTHERN DIVISION

DARRYL PRUITT,                 )  
                                   )  
Plaintiff,                     )  
                                   )  
v.                             >)CIVIL ACTION NO.  
                                   >)83-T-903-N  
THE CITY OF                     )  
MONTGOMERY; et al.,            )  
                                   )  
Defendants                     )

ORDER

The court is of the opinion that the order entered in this cause on June 12, 1984, should be amended by substituting the following paragraph for the final paragraph at the end of Part I of the order, appearing on page 2.

Kidd testified by deposition that, relying on the State and City's deadly force policy, he shot Pruitt to prevent him from escaping arrest. Kidd testified that, when he first encountered Pruitt emerging from a darkened bush, Pruitt was about to attack him so he raised his shotgun to "high port", whereupon Pruitt veered

and began running away. Kidd stated that he began to give chase but quickly became convinced that he could not overtake Pruitt and effect an arrest. At that point, Kidd shouted a command for Pruitt to stop and fired when that command was unheeded. Although Kidd testified that he initially feared an attack from Pruitt, his deposition testimony repeatedly indicates that Kidd's own subjective concern was for effecting Pruitt's arrest, and not for his own or another's safety.

Accordingly, it is ORDERED that the June 12, 1984, order be and it is hereby amended as indicated above.

DONE, this the 26th day of July,  
1984.

/s/ Myron Thompson  
UNITED STATES DISTRICT JUDGE

## APPENDIX B

§13A-3-26

DEFENSES

§13A-3-27

\* \* \* \* \*

§13A-3-27. USE OF FORCE IN MAKING AN ARREST OR PREVENTING AN ESCAPE.

(a) A peace officer is justified in using that degree of physical force which he reasonably believes to be necessary, upon a person in order:

(1) To make an arrest for a misdemeanor, violation or violation of a criminal ordinance, or to prevent the escape from custody of a person arrested for a misdemeanor, violation or violation of a criminal ordinance, unless the peace officer knows that the arrest is unauthorized; or

(2) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical

force while making or attempting to make an arrest for a misdemeanor, violation or violation of a criminal ordinance, or while preventing or attempting to prevent an escape from custody of a person who has been legally arrested for a misdemeanor, violation or violation of a criminal ordinance.

(b) A peace officer is justified in using deadly physical force upon another person when and to the extent that he reasonably believes it necessary in order:

(1) To make an arrest for a felony or to prevent the escape from custody of a person arrested for a felony, unless the officer knows that the arrest is unauthorized; or

(2) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly

physical force.

(c) Nothing in subdivision (a)(1), or (b)(1) or (f)(2) constitutes justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to persons being arrested or to innocent persons whom he is not seeking to arrest or retain in custody.

(d) A peace officer who is effecting an arrest pursuant to a warrant is justified in using the physical force prescribed in subsections (a) and (b) unless the warrant is invalid and is known by the officer to be invalid.

(e) Except as provided in subsection (f), a person who has been directed by a peace officer to assist him to effect an arrest or to prevent an escape from custody is justified in using physical force when and to the extent that he

reasonably believes that force to be necessary to carry out the peace officer's direction.

(f) A person who has been directed to assist a peace officer under circumstances specified in subsection (e) may use deadly physical force to effect an arrest or to prevent an escape only when:

(1) He reasonably believes that force to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(2) He is authorized by the peace officer to use deadly physical force and does not know that the peace officer himself is not authorized to use deadly physical force under the circumstances.

(g) A private person acting on his own account is justified in using physical force upon another person when and to the

extent that he reasonably believes it necessary to effect an arrest or to prevent the escape from custody of an arrested person whom he reasonably believes has committed a felony and who in fact has committed that felony, but he is justified in using deadly physical force for the purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

(h) A guard or peace officer employed in a detention facility is justified:

(1) In using deadly physical force when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be the escape of a prisoner accused or convicted of a felony from any detention facility, or from armed escort or guard;

(2) In using physical force, but not deadly physical force, in all other circumstances when and to extent that he reasonably believes it necessary to prevent what he reasonably believes to be the escape of a prisoner from a detention facility.

(3) "Detention facility" means any place used for the confinement, pursuant to law, of a person:

- a. Charged with or convicted of an offense; or
- b. Charged with being or adjudicated a youthful offender, a neglected minor or juvenile delinquent; or
- c. Held for extradition; or
- d. Otherwise confined pursuant to an order of a criminal court. (Acts 1977, No. 607, p. 812, § 630; Acts 1979, No. 79-599, p. 1060, § 1)

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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NO. 84-7571

---

DARRYL PRUITT,

(PLAINTIFF)-APPELLEE

VS.

CITY OF MONTGOMERY AND LESTER G. KIDD,

(DEFENDANT)-APPELLANTS

AN APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE MIDDLE DISTRICT  
OF ALABAMA

(CIVIL ACTION NO. 83-T-903-N)

ON MOTION TO INTERVENE BY THE STATE  
AND THE ATTORNEY GENERAL OF ALABAMA

(28 U.S.C. 2403)

MOTION OF THE STATE OF ALABAMA AND  
CHARLES A. GRADDICK, ATTORNEY GENERAL,  
UNDER 28 U.S.C. 2403, TO INTERVENE  
FOR THE SOLE PURPOSE OF DEFENDING THE  
CONSTITUTIONALITY OF SECTION 13A-3-27,  
CODE OF ALABAMA, 1975 AND THE PUBLIC  
INTEREST OF THE PEOPLE OF ALABAMA

Come the State of Alabama and Charles A. Graddick, Attorney General of Alabama, and move to intervene in the above styled cause under Title 28, United States Code, Section 2403 for the sole purpose of defending the Constitutionality of Title 13A, Section 13A-3-27, Code of Alabama, 1975 and the public interest of the People of the State of Alabama. The grounds for this motion are as follows:

1. Your movant, Charles A. Graddick, is the duly elected Attorney General of Alabama.
2. In the instant case the District Court ruled that Section 13A-3-27, Code of Alabama, 1975, is unconstitutional to the extent that it excuses the use of deadly force by a police officer, where such force is necessary to overcome

resistance to lawful arrest for a felony, in situations where the officer has no "...good reason to believe that the use of such force is necessary to prevent imminent, or at least a substantial likelihood of, death or great bodily harm...." (Mns. Op. p. 3).

3. The public interest of the People of Alabama, including the protection of life, the control of violence and the advancement of the Rule of Law, requires that clear limits be set by the law on the nature and extent of force which is justified in overcoming resistance to a lawful arrest. Such limits must be susceptible to practical application in emergency situations where police officers must make quick decisions based on a minimum of information.

4. Section 13A-3-27, Code of Alabama, 1975, represents the State of Alabama's effort to set such limits. Under Section 13A-3-27 prospective arrestees know the exact limits of the force which may be used against them, should they choose to resist arrest, and police officers know the exact extent to which the law will hold them justified, if they use force to overcome resistance to a lawful arrest.

5. Section 13A-3-27, Code of Alabama, 1975 is constitutional

6. This case was docketed into this Honorable Court on September 5, 1984.

7. The record has not been filed in this case and is not due until sometime in October.

Therefore, the premises considered,  
your movants pray that this Honorable  
Court will allow them to intervene in  
this cause for the limited purposes set  
out above.

Respectfully submitted,

/s/ Charles A. Graddick  
CHARLES A. GRADDICK  
ATTORNEY GENERAL

/s/ Joseph G. L. Marston III  
ASSISTANT ATTORNEY GENERAL  
ATTORNEY FOR MOVANTS

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III,  
Assistant Attorney General of Alabama and  
attorney for the movants herein, do  
hereby certify that on this 14th day of  
September, 1984, I did serve copies of  
the foregoing on the attorneys for the  
parties by mailing the same to them first  
class postage prepaid and addressed as  
follows:

Honorable Robert C. Black  
Attorney at Law  
P. O. Box 116  
Montgomery, Alabama 36195-2401

Honorable N. Gunter Guy  
Attorney at Law  
City of Montgomery  
P. O. Box 1111  
Montgomery, Alabama 36192

Honorable Ira B. Burnin &  
Honorable Dennis Charles Sweet III  
Attorneys at Law  
P. O. Box 2087  
Montgomery, Alabama 36102-2087

/s/ Joseph G. L. Marston III  
ASSISTANT ATTORNEY GENERAL

**ADDRESS OF COUNSEL:**

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Montgomery, Alabama 36130  
(205) 834-5150

APPENDIX D  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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NO. 84-7571

---

DARRYL PRUITT,

Plaintiff-Appellee,

versus

THE CITY OF MONTGOMERY,  
ALABAMA, et al.,

Defendants-Appellants

- - - - -

On Appeal from the United States  
District Court for the Middle  
District of Alabama

O R D E R:

The motion of the State and Attorney  
General of Alabama for leave to intervene  
is granted.

/s/ Robert R. Vance  
UNITED STATES CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

CITY OF MONTGOMERY, )  
ALABAMA, )  
Defendant-Appellant,) )  
vs. ) No. 84-7571  
DARRYL PRUITT, )  
Plaintiff-Appellee. )

MOTION FOR STAY OF PROCEEDINGS  
ON APPEAL

Now comes the appellee, Darryl Pruitt, and moves that this Court stay the proceedings on appeal until the U.S. Supreme Court issues its decision in Memphis Police Department v. Garner, \_\_\_\_ U.S. \_\_\_, 104 S.Ct. 1489 (1984) (granting cert.), and its companion case, State of Tennessee v. Garner, \_\_\_\_ U.S. \_\_\_, 104 S.Ct. 1589 (1984) (prob. juris. noted).

In support of his motion, appellee states:

1. The Garner litigation, pending in the U.S. Supreme Court, presents an issue which controls the disposition of this case, namely, whether the U.S. Constitution forbids law enforcement officers from using deadly force to arrest suspected felons who are not dangerous. In Garner v. Memphis Police Department, 710 F.2d 240 (6th Cir. 1983), the U.S. Court of Appeals for the Sixth Circuit held that the use of deadly force in such circumstances is unconstitutional. The Memphis Police Department, joined by the State of Tennessee, appealed that ruling to the U.S. Supreme Court, which granted certiorari on March 19, 1984. Oral argument in the case is scheduled for October 30, 1984. A

decision is anticipated by March of next year.

2. The decision of the district court challenged in the instant case rests on the same legal proposition at issue in Garner. The instant case concerns the shooting of a black teenager who was allegedly fleeing from the scene of a burglary. A City of Montgomery police officer fired two shotgun blasts at the plaintiff, leaving him paralyzed in one leg. (The police tip that a burglary was in progress turned out to be mistaken. No burglary was in progress or had occurred). The district court granted partial summary judgment against the City of Montgomery, finding that plaintiff had been shot pursuant to an unlawful City policy that permitted police officers to use deadly force to arrest non-dangerous felons.

Relying on its decision in Ayler v. Hopper, 532 F.Supp. 198 (M.D.Ala., 1981), the district court held that "the use of deadly force to stop a fleeing ... felon constitute[s] a civil rights violation actionable under §1983 'unless the [police] official has good reason to believe that the use of such force is necessary to prevent imminent, or at least a substantial likelihood of, death or great bodily harm.' Pruitt v. City of Montgomery, No. 83-T-903-N, slip. op. at 3 (June 12, 1984) (order granting partial summary judgment).<sup>1</sup> The court found that the defendant City's shooting policy did not conform to the standard laid down in Ayler. Moreover, the court found that no genuine issue of fact existed

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1. A copy of the court's order and a later amendment to the order is attached to this motion.

concerning whether the officer who shot plaintiff believed that his use of deadly force was necessary to prevent death or great bodily harm. The court wrote:

Officer Kidd's testimony about the shooting is clear and straightforward and permits only one reasonable conclusion: Kidd shot Pruitt to prevent him from escaping arrest, and not because he posed a danger of death or bodily injury to anyone. Kidd's use of deadly force under these circumstances ... violated Pruitt's civil rights.

Id. at 4. The court therefore granted summary judgment in the plaintiff's favor on the issue of liability. A jury later awarded plaintiff damages in the amount of \$100,000.

3. Because the outcome of Garner will have a profound impact on the law that controls this case, plaintiff submits that it would be appropriate for this Court to stay the instant appeal

until a decision is issued in Garner. It would require a substantial investment of time and resources for the parties to brief, and for this Court to decide, the determinative question in this case of whether it violates the constitution for a city to permit its police officers to use deadly force to arrest non-dangerous felons. Because in the end this Court's resolution of this issue will be controlled by the U.S. Supreme Court's decision in Garner, the expenditure of such time and resources will not materially advance this litigation.

WHEREFORE, plaintiff prays that this Court enter an order staying the instant proceedings until the U.S. Supreme Court issues a decision in the Garner litigation.

Respectfully submitted,

/s/ Dennis Sweet

IRA A. BURNIM

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MORRIS DEES

Post Office Box 2087

Montgomery, AL 36103-2087

205 264-0286

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel for appellants and upon the Attorney General of the State of Alabama by first class U.S. mail, this 11th day of October, 1984.

/s/ Dennis Sweet

Attorney for Appellee

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Charles A. Graddick, Attorney General and the State of Alabama, do hereby certify that on this \_\_\_\_ day of November, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for all of the other parties in the Court of Appeals, by mailing the same to them first-class postage prepaid and addressed as follows:

Honorable Robert C. Black  
Attorney at Law  
P. O. Box 116  
Montgomery, Alabama 36195-2401

Honorable N. Gunter Guy  
Attorney at Law  
City of Montgomery  
P. O. Box 1111  
Montgomery, Alabama 36192

Honorable Ira B. Burnin &  
Honorable Dennis Charles Sweet III  
Attorneys at Law  
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---

JOSEPH G. L. MARTSON III  
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